Malaysia National Insurance Sdn Bhd v Tan Kong Min

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-348 OF 1996

DENIS ONG, PS GILL AND MOHD GHAZALI JJCA

11 MAY 2003

Land Law *— Charge — Sale of land — Sale proceeds insufficient to pay amount outstanding — Commencement of legal action to recover shortfall — Whether action time-barred — Whether chargee's claim founded on contract or tort action — Whether chargee's action was to recover money secured by charge — Whether s 6(1)(a) or s 21 of the Limitation Act 1953 applied*

Limitation *— Charge — Action by chargee to recover shortfall from a foreclosure proceeding — Whether action time-barred — Whether chargee's claim founded on contract or tort action — Whether chargee's action case was to recover money secured by charge — Whether s 6(1)(a) or s 21 of the Limitation Act 1953 applied*

On 28 March 1984 the appellant, an insurance company granted a housing loan to the respondent for an amount of RM142,000. By way of security for the housing loan, the respondent, created a first legal charge over a piece of land held under title No GM 1984, Lot No 11393, Mukim of Kuala Kuantan, Pahang ('the said land'). The respondent subsequently defaulted in the repayment of the loan. On 18 September 1986, the appellant through its solicitors, demanded payment of arrears of the unpaid instalments. Since there was no response from the respondent, the appellant exercised its statutory rights to the charge and foreclosed the said land by way of a public auction on 16 March 1992. The said land was sold for RM80,100 leaving a balance of RM255,912.52 still due and owing from the respondent to the appellant. Under cl 7 of the charge annexure, the respondent as chargor had agreed to pay the appellant the difference between the amount due and the amount realized from the sale. Two further notices dated 18 August 1994 and 11 November 1994 were sent to the respondent demanding payment of the amount outstanding but it was of no avail. On 17 March 1995 the appellant commenced legal proceedings against the respondent for the balance sum due and owing by the latter. The learned High Court judge held that since the cause of action arose on 26 September 1986, that is, the date the appellant sent the first notice to the respondent, the appellant should have filed the suit against the respondent within six years from that date. The learned High Court judge accordingly dismissed the appellant's claim on the ground that the same was time-barred. Hence the issue to be determined in this appeal was: 'where there was a foreclosure action and in the event that monies realized from the sale did not satisfy the amount outstanding, whether a further action instituted to recover the amount outstanding would be barred under the provisions of s 6(1)(a) or s 21 of the Limitation Act 1953 ('the Act')'.

Held, allowing the appeal: A

(1) Section 6(1) of the Act applied to an action founded in contract and tort and certain other actions whereas s 21 of the Act related specifically to an action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land. In this present action, the appellant's claim was not founded on a contract or tort B action. It was purely a case for the recovery of the shortfall sum due under cl 7 of the charge annexure and not under the provisions of a contract. That being the case, s 21(1) of the Act applied and not s 6(1)(a) as contended by the respondent. Hence, even if the cause of action arose on 26 September 1986, the civil suit was filed on 17 March 1995, which was well within the 12- C year limit (see p 478B–D).

(2) The learned judge erred in arriving on his decision that s 6(1)(a) of the Act was applicable. Since the civil suit was filed within the period of 12 years as stipulated by the provisions of s 21(1) of the Act, the suit was therefore not statute-barred (see pp 478I–479A). D

[Bahasa Malaysia summary

Pada 28 Mac 1984, perayu, sebuah syarikat insurans telah memberikan pinjaman perumahan kepada responden sejumlah E RM142,000. Melalui jaminan untuk pinjaman perumahan tersebut, responden, telah memasukkan satu gadaian pertama yang sah ke atas sebidang tanah yang dipegang di bawah hak milik No GM 1984, Lot No 11393, Mukim of Kuala Kuantan, Pahang ('tanah tersebut'). Responden kemudian telah gagal untuk membuat bayaran balik pinjaman tersebut. Pada 18 September 1986, perayu melalui F peguamcaranya, telah menuntut pendapatan semula bayaran ansuran yang tidak dibayar. Oleh kerana tiada jawapan daripada responden, perayu telah mneggunakan hak statutorinya untuk menggadai dan menghalang tebus tanah tersebut melalui lelongan awam pada 16 Mac 1992. Tanah tersebut telah dijual pada harga RM80,100 G meninggalkan baki sejumlah RM255,912.52 yang masih perlu dibayar dan terhutang dari responden kepada perayu. Di bawah fasal 7 lampiran gadaian, responden sebagai penggadai telah bersetuju untuk membayar perayu perbezaan antara jumlah yang perlu dibayar dengan jumlah yang diperolehi daripada jualan. Dua notis selanjutnya bertarikh 18 Ogos 1994 dan 11 November 1994 telah dihantar kepada H responden menuntut bayaran baki jumlah belum berbayar tetapi tiada bayaran dibuat. Pada 17 Mac 1995, perayu telah memulakan prosiding undang-undang terhadap responden untuk baki jumlah yang perlu dibayar dan terhutang oleh beliau. Hakim Mahkamah Tinggi telah memutuskan bahawa kausa tindakan telah timbul pada 26 September 1986, iaitu, pada tarikh perayu dihantar notis pertama I kepada responden, perayu sepatutnya memfailkan guaman terhadap responden dalam tempoh enam tahun daripada tarikh tersebut.

A Hakim Mahkamah Tinggi dengan wajar telah menolak tuntutan perayu atas alasan yang sama telah luput had masa. Justeru tiu, persoalan yang perlu ditentukan dalam rayuan ini adalah: 'Where there was a foreclosure action and in the event that monies realized from the sale did not satisfy the amount outstanding, whether a further action instituted to recover the amount outstanding would be
B barred under the provisions of s 6(1)(a) or s 21 of the Limitation Act 1953 ('the Act')'.

Diputuskan, membenarkan rayuan tersebut:

C (1) Seksyen 6(1) Akta tersebut terpakai kepada satu tindakan dalam kontrak dan tort dan tindakan-tindakan lain tertentu walhal s 21 Akta tersebut dengan khususnya mengenai satu tindakan untuk mendapat balik wang yang terjamin oleh satu cagaran atau gadaian atau untuk mendapat balik hasil jualan tanah tersebut. Dalam tindakan semasa, tuntutan perayu tidak didapati atas
D tindakan kontrak atau tort. Ia adalah satu kes mendapat balik kekurangan jumlah yang perlu dibayar di bawah fasal 7 lampiran gadaian dan bukan dalam peruntukan kontrak. Jika begitu kesnya, s 21(1) Akta tersebut terpakai dan bukan s 6(1)(a) sebagaimana yang dihujahkan oleh responden. Justeru itu, walaupun kausa tindakan timbul pada 26 September 1986, guaman sivil difailkan
E pada 17 Mac 1995, yang masih dalam tempoh had masa 12 tahun (lihat ms 478B–D).

(2) Hakim yang bijaksana telah terkhilaf dalam membuat keputusan bahawas 6(1)(a) Akta tersebut adalah terpakai. Memandangkan tindakan sivil telah difailkan dalam tempoh 12 tahun sebagaimana yang ditetapkan dalam peruntukan s 21(1) Akta tersebut, guaman
F tersebut oleh itu tidak luput had masa (lihat ms 478I–479A).]

Notes

For cases on actions by chargee to recover shortfall from a foreclosure proceeding, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) para
G 2019.

For cases on sales of land under charge, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2081.

Cases referred to

H *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205 (refd)
Ramdin v Kalka Pershah (1884–1885) LRLA 12 (refd)

Legislation referred to

I Limitation Act 1953 ss 6(1)(a), 21

Appeal from: Suit No D5–22–40 of 1995 (High Court, Kuala Lumpur)

John Wong Yok Hon (*Azim, Tunku Farik & Wong*) for the appellant. A

SM Appaduray (*Mohd Rosli Yusoff* with him) (*Appaduray & Co*) for the respondent.

Pajan Singh Gill JCA (delivering judgment of the court): In a nutshell, this appeal before us revolves around a salient aspect in regard to the issue of limitation in an instance where there is a foreclosure action and in the B event that monies realized from the sale did not satisfy the amount outstanding, whether a further action instituted to recover the amount outstanding would be barred under the provisions of s 6(1)(a) or s 21 of the Limitation Act 1953 ('the Act').

The appellant, an insurance company, had issued a life insurance policy C to the respondent. On 28 March 1984, the appellant approved a housing loan application by the respondent for an amount of RM142,000 with an interest rate of 12% per annum. The respondent by way of security, among others, being the registered proprietor of land held under title No GM 1984, Lot No 1 1393, Mukim of Kuala Kuantan, Pahang ('the said land'), created a first legal charge over the said land in favour of the appellant. The D respondent defaulted in the repayment of the loan.

On 18 September 1986, the appellant through its solicitors, demanded payment of arrears of the unpaid instalments amounting to RM6,036 towards the loan and a further sum of RM1,977.80 towards the insurance premium, both amounts totalling to a sum of RM8,013.80. Since there was E no response from the respondent, the appellant exercised its statutory rights to the charge and foreclosed the said land by way of a public auction on 16 March 1992. The said land was sold for RM80,100 leaving a balance of RM255,912.52 still due and owing from the respondent to the appellant as at 16 March 1992 with interest still accruing thereon until full settlement.

Clause 7 of the annexure to the charge document ('the said cl 7') reads F as follows:

> 7 If the amount realized by the lender on a sale of the said land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues, costs, rents, rates, taxed and other outgoings on the said land is less than the amount due to the lender G and whether at such sale the lender is the purchaser or otherwise the chargor (s) shall pay to the lender the difference between the amount due and the amount so realized and until such payment will also pay interest on such balance at the prescribed rate as aforesaid with monthly rests.

Under the terms of the said cl 7, the respondent as chargor had agreed to H pay the appellant the difference between the amount due and the amount realized from the sale and until such payment, will also pay interest on the balance due at the prescribed rate with monthly rests.

Two further notices, dated 18 August 1994 and 11 November 1994, were sent to the respondent demanding payment of the amount outstanding but it was of no avail. On 17 March 1995, the appellant commenced legal I proceedings against the respondent for the balance sum due and owing by the latter.

In the court below, the respondent relied on the defence of limitation and laches and on the contention that the loan agreement was illegal and void and was prohibited by law. At the conclusion of the case, the learned judge dismissed the appellant's claim on the ground that it is time-barred and held that since the cause of action arose on 26 September 1986, ie the date the appellant sent the first notice to the respondent, the appellant should have filed the suit against the respondent within six years from that date, and, if necessary, have the suit stayed pending the outcome of the foreclosure action sale.

At the appeal before us, counsel for the appellant referred to s 6(1)(a) of the Act and contended that the learned judge had erred in law in not considering the provisions of s 21 of the same. He however candidly admitted that neither he nor counsel for the respondent had drawn the learned judge's attention to s 21 of the Act.

Section 6(1) of the Act read as follows:

> 6 Limitation of actions of contract and tort and certain other actions
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> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
> (b) actions to enforce a recognizance;
> (c) actions to enforce an award;
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
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> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

Section 21(1) of the Act read as follows:

> 21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

It is not disputed that the civil suit arose out of the provisions of the said cl 7, and the main question to be decided with regard to limitation, is whether the provisions of s 6(1) or s 21(1) of the Act apply.

The learned trial judge in considering the period of limitation came to the conclusion that the cause of action accrued seven days after 18 September 1986 viz, the date the first notice of demand was sent, and that the appellant could only enforce its rights, under the said cl 7, after the auction sale had been concluded. He rejected the appellant's argument that it has two separate causes of action, namely, that the foreclosure action is an action in rem, whilst the subsequent action is an action in personam

which arose only after the conclusion of the foreclosure proceedings. The learned trial judge held there was only one cause of action and that accrued on 26 September 1986, ie, seven days after the first notice of demand was sent and that the appellant should have filed the civil suit within six years from 26 September 1986. A

It cannot be disputed that the loan agreement by its nature is a charge agreement executed between the parties and it governs the respondent's liabilities. Section 6(1) of the Act applies to an action founded in contract and tort and certain other actions whereas s 21 of the same relates specifically to an action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land. In this present action, the appellant's suit to recover the shortfall sum arose out of the charge document. The respondent cannot therefore contract out of the provisions of the loan cum charge document. The said cl 7 is clear and unambiguous. What is also clear is that the appellant's claim is not founded on a contract or tort action. It is purely a case for the recovery of the shortfall sum due under the said cl 7 and not under the provisions of a contract. That being the case, we are of the view that s 21(1) of the Act applies and not s 6(1)(a) of the same, as contended by the respondent, and hence even if the cause of action did arise on 26 September 1986 as held by the learned judge, the civil suit was filed on 17 March 1995 and was thus well within the 12-year-limit. B C D

Learned counsel for the respondent argued that the claim to recover the shortfall was based purely on a contractual obligation and that the learned judge was correct in finding that the cause of action arose on 26 September 1986 and not on 16 March 1992. Counsel contended that the said land was auctioned off in 1992 and as such the charge was discharged. Counsel however failed to appreciate the fact that even if the charge has been discharged by the auction, the shortfall was still due under the said cl 7. Counsel referred to two cases in support of his submission, namely, *Ramdin v Kalka Pershah* (1884–1885) LRLA 12 (PC) *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205 (PC) at p 205. We find the above cases referred to do not appear to support his proposition of the law. E F

The learned judge, without the benefit of the assistance of both counsel with regards to the existence of s 21(1) of the Act, inter alia, also rejected the claim of the appellant primarily by holding that the civil suit was barred by s 6(1)(a) of the Act, quite apart from the issue of laches. On the issue of the equitable doctrine of laches which we find distinct from the statutory defence of limitation, it is our view that no evidence was proffered in the course of the trial below as to whether the appellant had taken a supine position in the conduct of the present action. The learned judge in fact had taken the view that since the respondent had successfully established a defence of limitation, it could equally be held that the equitable doctrine of laches was applicable. We are of the considered opinion view that he erred in arriving at such an erroneous conclusion, in view of the fact, that we hold on appeal that limitation has yet to set in, in this instance. G H I

On the whole, having considered the provisions of s 21(1) of the Act and on the facts of the case, we are of the view that the learned judge erred

A in arriving on his decision that s 6(1)(a) of the Act is applicable. In our view the provisions of s 21(1) of the Act are clear, and unambiguous, and therefore cannot be brushed aside. We hold that the civil suit was filed within the period of 12 years as stipulated by the provisions of s 21(1) of the Act, and was therefore not statute-barred. We agree, however, with the finding of the learned judge, that the loan agreement was not illegal, and
B void, nor prohibited by law.

We allowed the appeal with costs, and judgment was accordingly entered for the appellant as prayed in prayers (a), (b) and (c) of the amended statement of claim. The counterclaim is dismissed. We also ordered that the deposit is to be returned to the appellant.

C *Appeal allowed.*

Reported by Lim Lee Na

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